IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 99 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?No

STATE OF GUJARAT

Versus

KRUSHNAKANT SHANTILAL PANDYA

Appearance:

Shri M.A.Bukhari, Additional Public Prosecutor, as instructed by Shri S.D.Patel, Advocate, for the original complainant.

Shri D.D.Vyas, Advocate, as instructed by Shri U.M.Panchal, Advocate for the respondents - accused.

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 29/10/96

ORAL JUDGEMENT

The judgment and order of acquittal passed by the learned Metropolitan Magistrate of Court No. 9 at Ahmedabad on 18th October 1991 in Criminal Case No.3176 of 1989 is under challenge in this appeal by leave of this court under Section 378 (4) of the Code of Criminal Procedure, 1973 (the New Cr.PC for brief). Thereby the learned trial Magistrate acquitted the respondents herein as the accused of the offences punishable under Section 409, Section 468 read with Section 464, Section 477-A and Section 114 of the Indian Penal Code, 1860 (the IPC for brief).

2. The facts giving rise to this appeal move in a narrow compass. Respondent No.1 herein was the Chairman of the Gujarat State Khadi Gramodyog Karmachari Credit Cooperative Society Ltd. (the Society for convenience) and respondent No.2 herein was its Secretary and respondent No.5 herein was its Accountant at the relevant time during the period from 1983 to 1988. It does not become clear from the record as to what was the status of each of respondents Nos. 3 and 4 herein at the relevant time qua the Society. It has been alleged that the respondents herein in collusion with each other embezzled the moneys of the Society by creating false documents of encashment of loans in the names of certain fixed deposit-holders without actually paying the loan amounts to such fixed deposit-holders. It appears that such malpractices alleged to have been adopted by the respondents herein came to light during the tenure of one Kirankumar Babulal Shah (the complainant for convenience) when he became the Chairman of the Society. It appears that, during his tenure as its chairman, the report of the Government Auditor with respect to the affairs of the Society was received pointing out certain irregularities in maintenance of accounts. Thereupon, the complainant got appointed one Ambalal Keshavlal as an internal auditor for the purpose of auditing the past accounts of the Society. It may be mentioned that he was working as senior auditor in the Gujarat Rajya Khadi Gramodyog Board (the Board for convenience). He submitted his report at Exh.50 on the record of the trial court. Thereafter, the complainant gave his complaint in the Court of the Metropolitan Magistrate of Court No.9 at Ahmedabad on 28th August 1989 charging the respondents herein with the offences punishable under Sections 406, 409, 416, 468 read with Sections 464, 447 and 114 of the IPC. It came to be registered as Inquiry Complaint No.111 of 1989. By his order passed therebelow, the learned trial Magistrate ordered the complaint to be sent for investigation under

Section 156 (3) of the New Cr.PC. It appears that the police submitted a chargesheet against the accused on 22nd December 1989 charging the respondents herein as the accused of the offences punishable under Sections 409, 468 read with Section 464, 477-A and 114 of the IPC. It came to be registered as Criminal Case No.3176 of 1989. The charge against the accused was framed on 12th January 1990 at Exh.2 on the record of the trial court. No accused pleaded guilty to the charge. They were thereupon tried. After recording the prosecution evidence and after recording the further statement of each accused under Section 313 of the new Cr.PC and after hearing arguments, by his judgment and order passed on 18th October 1991 in Criminal Case No.3176 of 1989, the learned Metropolitan Magistrate of Court No.9 at Ahmedabad acquitted the respondents herein as the accused of the offences with which they were charged. That aggrieved both the original complainant and the prosecution agency. The prosecution agency thereupon invoked the appellate jurisdiction of this court after obtaining its leave by means of this appeal for questioning the correctness of the aforesaid judgment and order of acquittal passed by the learned trial Magistrate.

3. It appears that the original complainant also applied for special leave to appeal against the aforesaid judgment and order of acquittal passed by the learned trial Magistrate by means of Miscellaneous Criminal Appeal No.3949 of 1991. By the order passed by this court on 1st October 1993, such leave was refused and the application was rejected. The original complainant has however engaged learned Advocate Shri S.D.Patel to assist the learned Additional Public Prosecutor for conducting this appeal.

4. Learned Advocate Shri Vyas for the respondents herein has raised a preliminary objection against maintainability of this appeal in view of Section 378 (6) of the New Cr.PC. This submission is based on the fact that special leave to appeal at the instance of the original complainant was refused by this court by the order passed on 1st October 1993. In that view of the matter, according to learned Advocate Shri Vyas for the respondents herein, the present appeal for which leave to appeal was granted on that very day on 1st October 1993 was hit by Section 378 (6) of the New Cr.PC. As against this, learned Additional Public Prosecutor Shri Bukhari for the appellant - State as instructed by learned Advocate Shri S.D.Patel for the original complainant has submitted that the appeal at the instance of the original

complainant was not maintainable, and as such the bar contained in the aforesaid statutory provision will not come in the way of the present appeal.

5. As aforesaid, the prosecution agency preferred this appeal against the aforesaid judgment and order of acquittal passed by the learned trial magistrate and it simultaneously applied for leave to appeal. The original complainant also moved this court by means of Criminal Miscellaneous Application No.3949 of 1991 for grant of special leave to appeal against the very same judgment and order. Both the matters were placed on Board for their preliminary hearing on 1st October 1993. So far as the present appeal is concerned, the order passed by this reads: " Leave granted. Appeal admitted". So far as Criminal Miscellaneous Application No.3949 of 1991 is concerned, this court passed its order thereon to the effect : "Leave refused. Rejected". Even at the cost of repetition, it may be reiterated that both the aforesaid orders were passed on the very same day on 1st October 1993.

6. Learned Advocate Shri Vyas for the respondents herein has submitted that the aforesaid order passed by this court on the application for special leave to appeal made by the original complainant should be treated as the order on merits of the case, and as such it would not be open to this court to go behind that order. Any attempt in that regard, runs the submission of learned Advocate Shri Vyas for the respondents herein, would tantamount to reviewing the aforesaid order passed by this court which review is not permissible according to well settled principles of law. As against this, it has been urged by learned Additional Public Prosecutor Shri Bukhari for the appellant - State that the aforesaid order passed by this court on 1st October 1993 in the application for special leave to appeal made by the original complainant has to be interpreted as refusal of leave and rejection of the application for the purpose on the ground that the appeal at the instance of the original complainant was not maintainable under Section 378 (4) of the New Cr.PC. According to learned Additional Public Prosecutor Shri Bukhari for the appellant - State, to interpret it otherwise would result in attribution of ignorance of law on the part of the learned Judge passing that order. He has further urged that, if the aforesaid order passed by the learned Judge of this court on 1st October 1993 refusing special leave to appeal and rejection of the application for the purpose is interpreted to mean refusal of leave and rejection of the application on the ground that the appeal at the instance of the private

complainant was not maintainable under Section 378 (4) of the New Cr.PC on the facts and in the circumstances of the case, the bar under Section 378 (6) thereof would not operate in this case.

7. In order to appreciate rival contentions urged before me, it would be quite necessary to look at the relevant provisions contained in Section 378 of the New Cr.Pc with respect to the right of the private complainant to appeal against the judgment and order of acquittal passed by the lower court. The relevant provisions are in sub-sections (4) and (6) of Section 378 of the New Cr.PC. They read:

" 378 (4) - If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(6) - If, in any case, the application under sub-section (4) for the grant of special leave to appeal from the order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

It becomes clear from bare perusal of the aforesaid statutory provisions that the original complainant is also empowered to move the High Court for special leave to appeal against the judgment and order of acquittal in a criminal case instituted on his complaint and, if special leave to appeal is refused, no further appeal against the judgment and order of acquittal in question shall lie under sub-section (1) of Section 378 thereof. In view of these statutory provisions, it will be necessary to ascertain in what circumstances the original complainant can avail of the benefit of Section 378 (4) thereof.

8. The phrase "case instituted upon complaint" is not defined anywhere in the New Cr.PC. The word "complaint" is however defined in Section 2 (d) thereof to mean "any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report".

9. The Explanation appearing therebelow also deserves to be noted. It reads:

" Explanation: A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

It thus becomes clear that a report made by a police officer after due investigation disclosing the commission of a non-cognizable offence would also be a complaint and the police officer making such report would also be the complainant.

10. The scheme of the New Cr.PC is to the effect that the trial before a criminal court is conducted by and on behalf of the prosecution agency whether the complainant is a private party or a police officer within the meaning of Section 2 (d) thereof. The police officer deemed to be the complainant for the purpose would certainly be an instrumentality of the prosecution agency. He would be in employment of the State Government. The prosecution agency is also an instrumentality of the State Government. It needs no telling that it is a part of its law and order maintaining agency. Sub-section (1) of Section 378 of the New Cr.PC enables the State Government to appeal to the High Court against an original or appellate order of acquittal passed by any lower court. It would therefore mean that such appeal can be said to have been preferred by the prosecution agency which conducted the trial on behalf of the complainant irrespective of the fact whether he was a police officer or a private party. No private complainant can avail of the benefit of this provision. It appears that, with a view not to depriving the original complainant of his right to seek redressal of his grievances against the order of acquittal passed by any lower court, he has also been empowered to approach the High Court for special leave to appeal against such order of acquittal passed by any lower court. It thus becomes clear that Section 378 (4) of the New Cr.PC is designed to enable a private complainant to approach this court in appeal against the order of acquittal passed by any lower court. When the State Government approaches the High Court for an appeal against the order of acquittal passed by any lower court under sub-section (1) of Section 378 thereof, it has to apply for leave of this court under sub-section (3) thereof. So far as the private complainant is concerned, he has to apply for special leave to appeal against an order of acquittal passed by any lower court under sub-section (4) thereof. This distinction buttresses

view I have taken to the effect that sub-section (4) of Section 378 thereof enables a private complainant to approach this court for special leave to appeal against an order of acquittal passed by any lower court.

11. The question then arises as to when can a case be said to be instituted upon complaint. It needs no repetition that a private complainant can approach this court for special leave to appeal against an order of acquittal passed by any lower court only if the case in question is "instituted upon complaint". It will therefore be necessary to find out the meaning of the expression "any case instituted upon complaint".

12. In this connection, a reference deserves to be made to the binding ruling of the Supreme Court in the case of JAMUNA SINGH v. BHADAI SHAH reported in AIR 1964 Supreme Court at page 1541. In that case, the supreme Court had to interpret the provisions contained in Section 417 (3) of the Code of Criminal Procedure, 1898 (the Old Cr.PC for convenience). It was in pari materia with Section 378 (4) of the New Cr.PC. Under the aforesaid statutory provision of the Old Cr.PC, a private complainant was enabled to ventilate his grievances against an order of acquittal passed by any lower court by applying for special leave to appeal to the High Court obviously if the case in question was instituted upon complaint. In that case, it appears that the Sessions Court acquitted the accused of the offences punishable under Sections 395 and 323 of the IPC. The original complainant invoked the appellate jurisdiction of the High Court of Patna under Section 417 (3) of the Old Cr.PC against the aforesaid judgment and order of acquittal after obtaining its special leave for the purpose. The High Court set aside the acquittal and convicted the accused of the offence punishable under Section 395 of the IPC and sentenced them to rigorous imprisonment for two years. The accused thereupon invoked the appellate jurisdiction of the Supreme Court by its special leave. It was contended on their behalf that the appeal at the instance of the original complainant before the High Court was not maintainable under Section 417 (3) of the Old Cr.PC. Repelling that contention the Supreme Court has held:

" The Code does not contain any definition of the words "institution of a case". It is clear however and indeed not disputed that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein.

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An examination of these provisions (provisions of sections 154, 173, 190, 193,194 and 200 of the Old Cr.PC) makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report."

The aforesaid ruling of the Supreme Court is obviously binding to this court in view of Article 141 of the Constitution of India. In that case, the court had taken cognizance of the offences mentioned in the complaint by examining the complainant under Section 200 of the Old Cr.PC. In that view of the matter, the Supreme Court held that the case in question was instituted upon complaint and the appeal at the instance of the original complainant under Section 417 (3) of the Old Cr.PC was maintainable.

13. It transpires from the record of this case that the original complainant made a written complaint before the learned Metropolitan Magistrate of Court No.9 at Ahmedabad on 28th August 1989. By his order passed therebelow on that very day, the learned trial Magistrate ordered it to be sent for investigation under Section 156 (3) of the New Cr.PC. It thereupon came to be registered as Inquiry Complaint No.111 of 1989. As aforesaid, the police submitted the chargesheet or the report on 22nd December 1989 and thereupon the court took the cognizance of the offences mentioned in the chargesheet. It thereupon came to be registered as Criminal Case No.3176 of 1989. It may be mentioned that the complaint is at Exh.30 on the record of the trial court and the offences mentioned therein are those punishable under Sections 406, 409, 416, 468 read with Sections 464, 447 and Section 114 of the IPC. Such cognizance is obviously taken on the basis of the chargesheet submitted by the police and not solely on the basis of the complaint at Exh.30 on the record of the trial court. It needs no telling that the complainant did not mention the offence punishable under Section 477-A of the IPC. The court has however taken its cognizance on the basis of the police report or the chargesheet. In that view of the matter,

there is no hesitation in coming to the conclusion that the learned trial Magistrate has taken cognizance of the offences only on the basis of the chargesheet or the police report submitted to him on conclusion of the investigation as directed to be conducted by him by referring the complaint at Exh.30 for investigation under Section 156 (3) of the New Cr.PC. In view of the aforesaid ruling of the Supreme Court, the case against the respondents herein came to be instituted on the basis of the police report or the chargesheet and not upon the complaint of the complainant. If the case was not instituted upon the complaint of the complainant, he could not have a right to appeal against the order of acquittal passed by the lower court under Section 378 (4) of the New Cr.PC.

14. I am supported in my view by the Division Bench ruling of the Calcutta High Court in the case of KASIMUDDIN v. YUNUS ALI MONDAL reported in 1983 Criminal Law Journal at page 885. It was also a case arising under Section 417 (3) of the Old Cr.PC. In that case also, the complaint filed by the complainant before the

Magistrate was sent to the police for investigation under Section 156 (3) thereof and the cognizance of the offence against the accused was taken on the basis of the police report or the chargesheet submitted by the police on completion of the investigation. The trial ended in acquittal and the original complainant approached the High Court under Section 417 (3) of the Old Cr.PC. In that context, the Division Bench of the Calcutta High Court has held that the appeal by the original complainant under the aforesaid statutory provision was not maintainable.

15. I am in respectful agreement with the aforesaid ruling of the Division Bench of the Calcutta High Court. It buttresses the view I have taken in this case. The view taken therein is in consonance with the aforesaid binding ruling of the Supreme Court.

16. A reference also deserves to be made to the ruling of the Kerala High Court in the case of AHAMADKUTTY v. JOHNSON reported in 1989 Criminal Law Journal at page 2462. In that case also, the complaint of the complainant filed before the learned Magistrate was sent for investigation under Section 156 (3) of the New Cr.PC. The learned Magistrate took cognizance of the offence on the basis of the chargesheet or the police report submitted on completion of the investigation. The trial ended in acquittal. The original complainant

approached the High Court of Kerala under Section 378 (4) of the New Cr.PC for special leave to appeal against the judgment and order of acquittal in question. Disagreeing with the earlier view taken by the same court in the case of STATE OF KERALA v. WILFRED reported in 1968 Kerala Law Times at page 57 on the ground that it was no longer a good law in view of the aforesaid binding ruling of the Supreme Court, the Kerala High Court held the appeal at the instance of the original complainant under Section 378 (4) of the New Cr.PC as not maintainable on the facts and in the circumstances of the case.

17. I am in respectful agreement with the aforesaid ruling of the Kerala High Court. The view taken therein is in consonance with the aforesaid ruling of the Supreme Court.

18. The ruling of the Allahabad High Court in the case of BADRI PRASAD GUPTA v. KRIPA SHANKER TEWARI reported in AIR 1967 Allahabad at page 468 as relied on by learned Advocate Shri Vyas for the respondents herein will be of no assistance to the accused in this case for the simple reason that it runs counter to what has been held by the Supreme Court in its aforesaid binding ruling. It is not necessary to dilate upon it as it will not be a good law in view of the aforesaid binding ruling of the Supreme Court.

19. It thus becomes clear that the case giving rise to this appeal could not be said to be instituted upon the complaint of the original complainant. In that view of the matter, his appeal under Section 378 (4) of the Cr.PC could not be said to be maintainable. Leave to appeal was therefore refused and his application for the purpose was rejected.

20. It is difficult for me to agree with learned Advocate Shri Vyas for the respondents herein to the effect that leave to appeal was refused by examining the merits of the appeal and not on the ground that it was not maintainable. If that was so, runs the submission of learned Advocate Shri Vyas for the respondents, the order would have read to the effect that "leave to appeal is refused as it is not maintainable". Apparently, the order of this court in Criminal Miscellaneous Appeal No.3949 of 1991 passed on 1st October 1993 is a non-speaking order. It will not be possible for this court to read the words which are not there. If this court had refused leave to appeal and to reject the application for the purpose on merits, this court would have certainly written that leave to appeal was refused

as there were no merits in this case. On the contrary, I think I should interpret the aforesaid order of refusal of leave to appeal and rejection of the application for the purpose as the appeal was not maintainable on the facts and in the circumstances of the case. To do otherwise would tantamount to attributing absence of knowledge of law on the subject to the learned Judge of this court. It cannot be done so. It will be too much on my part to assume so. I am therefore of the opinion that leave to appeal against the impugned judgment and order of acquittal passed by the learned trial Magistrate in this case at the instance of the original complainant was refused on the ground that the appeal at his instance was not maintainable on the facts and in the circumstances of the case.

21. It is obvious that the bar created under sub-section (6) of Section 378 of the New Cr.PC would operate provided leave to appeal under sub-section (4) thereof is refused on merits of the case and not on the ground that the appeal was not maintainable. If the appeal is not maintainable, it is no appeal in the eyes of law. Rejection of the application for special leave to appeal is of no consequence in such a case. It is as good as not instituted. In that view of the matter, the order of refusal of leave to appeal and rejection of the application for the purpose on the ground of non-maintainability of the appeal will not come in the way of an appeal against the judgment and order of acquittal in question at the instance of the State Government under sub-section (1) of Section 378 of the New Cr.PC. Sub-section (6) thereof will not operate as a bar against such appeal.

22. In view of my aforesaid discussion, the preliminary objection against maintainability of this appeal as raised by learned Advocate Shri Vyas for the respondents herein is overruled.

23. That brings me to the merits of the case. The prosecution case is that the respondents herein got pocketed the amounts of loan shown to have been taken by certain fixed deposit-holders. No documentary evidence in that regard is found to have been brought on record. In order to establish such case at trial, what was required to be done by the prosecution was to bring on record the vouchers showing payment of loan amounts to the fixed deposit-holders in question. They could have brought on record the cheque book showing issue of cheques in the names of such fixed deposit-holders towards loan amounts. It transpires from the material on

record that the prosecution case in that regard was that loan amounts in the name of certain fixed deposit-holders were paid by bearer cheques and such bearer cheques were encashed by the respondents herein, more particularly by respondents Nos.3, 4 and 5 herein. The case could have been established by bringing on record the relevant encashed cheques from the bankers and the signatures of the persons receiving payment of the bearer cheques could have been proved to be those of the concerned accused. In fact, nothing of the sort has been done at trial. Even books of accounts are not produced to show that they represented false transactions. The prosecution has perhaps thought the criminal court to be omniscient and that appears to be the reason why no material for proving its case has been brought on record. The criminal court has to decide the case on the basis of the material on record. It is no use repeating the oft-quoted legal maxim that it is for the prosecution to bring the guilt home to the accused beyond any reasonable doubt. This it can do by bringing the relevant material on record. If the prosecution does not choose to do so, it has to thank itself. No fault can be found with the approach of the learned trial Magistrate in acquitting the accused in absence of the relevant material in that regard.

24. Learned Additional Public Prosecutor Shri Bukhari for the appellant - State has invited my attention to the efforts made by and on behalf of the prosecution to bring on record the relevant material. According to learned Additional Public Prosecutor Shri Bukhari for the appellant - State, if witnesses did not produce material on record, the prosecution was not at fault. It transpires from the material on record that the prosecution obtained the necessary orders from the court for production of certain books of accounts, cheque books, audited reports and the like records of the relevant time. It appears that the concerned witnesses did not respond to the summons issued in that regard. The prosecution does not appear to have pursued the matter any further for reasons best known to it. It has not drawn the attention of the court that the witnesses should be directed to produce the material by issuing bailable or non-bailable warrants. Even in written arguments, the prosecution has rested contented only by observing that the witnesses did not produce any material. No grievance is made that non-production of such material has denied or deprived the prosecution of an opportunity to prove the case against the accused beyond any reasonable doubt. I am therefore of the opinion that no grievance against the order of acquittal in this case can be accepted.

25. In view of my aforesaid discussion, I am of the opinion that the impugned judgment and order of acquittal passed by the learned trial Magistrate calls for no interference by this court in this appeal. It deserves to be dismissed.

26. In the result, this appeal fails. It is hereby dismissed.

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